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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 98

CHARLES ROBERT ANDERS,

Petitioner,

vs.

CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

IRA MICHAEL HEYMAN
Counsel for Petitioner

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BRIEF FOR PETITIONER

The Opinion Below

The order of the Supreme Court of California denying petitioner's motion for habeas corpus (P.R. 26)* is unreported.

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* References to P.R. are to the Printed Record.
References to R. are to the balance of the Record on file with the Court.

Jurisdiction

The order granting motion for leave to proceed *in forma pauperis*, and granting the petition for certiorari, was entered on April 4, 1966 (P.R. 27). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

Question Presented

May a State appellate court refuse to provide counsel to brief and argue an indigent criminal defendant's first appeal as of right on the basis of a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief?

Statement of the Case

Petitioner was convicted on August 8, 1957 of the felony of possessing marijuana, a narcotic, and was given an indeterminate sentence of six months to ten years (P.R. 2-3; App. A). He sought to appeal to the District Court of Appeal as an indigent. That court ordered the provision of a free transcript. On petitioner's request the appellate court appointed an attorney to act for him (P.R. 5). The attorney informed the court that he would not file a brief because in his opinion there was no merit to the appeal (P.R. 6). His letter read:

"Dear Judge Van Dyke:

"This is to advise you that I have received and examined the trial transcript of CHARLIE ANDERS as it relates to his conviction of the crime of possession of narcotics.

"I will not file a brief on appeal as I am of the Opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him as they relate to his appeal.

"Mr. Anders has advised me that he wishes to file a brief in this matter on his own behalf.

"Very truly yours,

....."

Petitioner requested the appointment of another attorney (R. Ex. 5). The court refused this request in a letter from the Clerk of the Court to petitioner stating: "We have been advised by your court appointed attorney that after examination of the record he can find no merit to your appeal" (P.R. 7). The letter also advised petitioner that he could file a brief himself or permit the court to review and decide the appeal on the record alone (P.R. 7).

Petitioner prepared his own brief (R. Ex. 8), the State responded (R. Ex. 9), and petitioner replied (R. Ex. 10). Petitioner urged that illegally seized items had been introduced into evidence, that the evidence was insufficient to sustain the conviction, that evidence was introduced to establish an offense not charged in the information, and that the jury was not properly instructed on all the essential elements of the offense (R. Exs. 8, 9, 10). He did *not* urge as error comments of the prosecutor and judge to the jury concerning his failure to testify (R. Ex. 2, pp. 108, 119-120). The District Court of Appeal on January 9, 1959 unanimously affirmed the conviction (R. Ex. 11), *People* v. *Anders,* 167 Cal.App.2d 65, 333 P.2d 854 (1959).

Petitioner thereafter was paroled and rearrested and convicted of another felony on January 22, 1964. This conviction was affirmed on appeal and petition for certiorari is presently pending in this Court (No. 492 Misc. October Term, 1965). Petitioner was given an indeterminate sentence of six months to fifteen years on this conviction to run consecutively with the term imposed on the prior conviction (App. A).

On January 21, 1965, petitioner filed for habeas corpus in the District Court of Appeal to reinstate his appeal on the prior conviction. He urged that he had been improperly denied assistance of counsel on the original appeal (P.R. 8-10). The District Court of Appeal denied the petition the same day with a brief opinion (P.R. 11):

> "The petition for writ of habeas corpus to reinstate applicant's appeal is denied since the procedure prescribed by In re Nash, 61 A.C. 538, was followed in this case and this court has again reviewed the record and has determined the appeal was without merit."

Petitioner then sought habeas corpus on the same grounds in the Supreme Court of California (P.R. 12-25), and his petition was denied (P.R. 26).

Summary of Argument

The Fourteenth Amendment requires a State to appoint counsel to represent an indigent criminal defendant who requests representation on his first appeal as of right. The object of the requirement is to assure to an indigent both a meaningful adversary process as well as substantial

equality with nonindigents on appeal. Neither object is achieved where provision of counsel to brief and argue the appeal is denied because the appellate court without benefit of counsel determines on review of the full trial record that the appeal is without merit or that counsel would not be advantageous to the indigent defendant. Nor are these objects any more achieved where, as here, provision of counsel to brief and argue the appeal is denied because the attorney appointed by the court to represent the indigent states in conclusory terms that the appeal is without merit and that he will not file a brief in its support.

ARGUMENT

I.

The Fourteenth Amendment Requires That Counsel Be Made Available to Represent an Indigent Criminal Defendant on His First Appeal as of Right in Order to Insure That an Indigent Will Have His Conviction Reviewed With the Benefit of Lawyer Prepared Briefs and Arguments on the Merits and That an Indigent Will Not Be Disadvantaged in This Respect as Compared With a Person Able to Retain Counsel.

This Court, in the line of cases commencing with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), has been engaged in defining the requirements under the Fourteenth Amendment of substantial equality of indigents with nonindigents in the administration of criminal appeals by the States. It has determined that filing fees cannot be demanded so as to bar an indigent's appeal, *Burns* v. *Ohio*, 360 U.S. 252 (1959); *Smith* v. *Bennett*, 365 U.S. 708 (1961); that a trial transcript or its equivalent must be provided without charge

so as to enable an effective appeal, *Griffin* v. *Illinois, supra; Eskridge* v. *Washington State Board of Prison Terms and Paroles,* 357 U.S. 214 (1958); *Draper* v. *Washington,* 372 U.S. 487 (1963); *Lane* v. *Brown,* 372 U.S. 477 (1963); and finally, that an appointed attorney must be made available on request to represent an indigent before the appellate court on his first appeal as of right, *Douglas* v. *California,* 372 U.S. 353 (1963).

This Court has imposed essentially the same requirements on the federal courts of appeal through construction of 28 U.S.C. 1915. *Coppedge* v. *United States,* 369 U.S. 438 (1962) and *Hardy* v. *United States,* 375 U.S. 277 (1964) make clear that an indigent on request must be provided with a trial transcript. *Johnson* v. *United States,* 352 U.S. 565 (1957), *Ellis* v. *United States,* 356 U.S. 674 (1958), and *Coppedge* v. *United States, supra,* require appointment of counsel on appeal.

The instant case deals with appointment of counsel. The question is whether an indigent appellant is afforded fair process and substantial equality of treatment under the California procedure deemed by the California Supreme Court to satisfy the requirement of *Douglas* v. *California, supra.* Under this procedure counsel is appointed automatically on request, but when counsel notifies the court that he finds no merit in the appeal and will not appear on behalf of the indigent the appellate court proceeds to make a judgment on the merits without benefit of counsel's argument, analysis and briefs.

Two primary reasons underlie the requirement that counsel must be made available to an indigent criminal on his first appeal as of right.

First, our criminal procedure is founded upon the adversary system. The essence of that system is challenge and its effectiveness "depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process." * The appellate process is a vital part of the adversary system. It depends on the marshalling of facts and authorities and skilled presentation by persons trained in the law. The whole process is a mere form if one of the adversaries in the contest is without such training. He normally will not be able to discover and present both obvious and hidden issues in the record, determine applicable law, and argue for relevant interpretations of or changes in existing law. Moreover, he will rarely have the ability to present arguments articulately and cogently so as to focus the attention of busy appellate judges on the substance of his claims.

This Court in *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963), stressed that the nature of our adversary system of criminal justice requires the provision of counsel at trials.

> "Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an

* Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice 10 (1963).

> orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."

These same considerations apply to appeals especially because appeals deal mainly with issues of "law" (rather than issues of "fact")—issues peculiarly within the province of trained lawyers. The adversary system requires counsel on both sides. Judge Burger concurring in *Johnson* v. *United States,* 360 F.2d 844, 847 (D.C. Cir. 1966), a case involving the same problem as the instant one and discussed at length below, stated cogently:

> "Counsel whose motion [to withdraw from an appointed assignment] we now deny must remember that under our adversary system an appellate court cannot function efficiently without lawyers to present whatever there is to be said on behalf of an appellant, however meager his claims may be, so that the Court can make an informed appraisal."

The second, and independent, reason for requiring appointment of counsel lies in the principle of substantial equality of treatment of indigents and nonindigents. This reason emerged clearly in *Douglas* v. *California* where this Court declared it to be a violation of the Fourteenth Amendment for California to condition appointment of counsel for an indigent's appeal, upon the appellate court's de-

termination that it would serve a useful purpose to do so. In this circumstance, said the Court:

> "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself." 372 U.S. at 357-358.
>
> "For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.' *Griffin* v. *Illinois, supra,* at p. 19." 372 U.S. at 355.

Clearly, the Fourteenth Amendment permits differences in treatment between rich and poor. "But where the merits of the *one and only appeal* an indigent has as of right are decided without benefit of counsel, ... an unconstitutional line has been drawn between rich and poor." *Douglas* v. *California, supra,* at 357.

II.

Petitioner Was Denied Fourteenth Amendment Rights When the California Appellate Court Affirmed His Conviction on the Merits Without the Benefit of Briefing and Argument of Counsel After Appointed Counsel Declined to Submit Arguments on the Basis of a Conclusory Notification That the Appeal Had No Merit.

Douglas v. *California* rejected a procedure under which the appellate court, unaided by counsel, studied the trial record of an indigent appellant's conviction to determine whether the case had sufficient merit to warrant appointment of counsel. The Court was rightfully fearful that the California procedure could lead to unjustified affirmances of conviction because no law-trained advocate for the indigent studied the record to uncover "hidden merit," researched the law, or marshalled arguments in written briefs on the indigent's behalf. This Court was unwilling to rely on the state appellate court acting as an investigator without adversary processes in screening meritorious cases from unmeritorious ones to determine when to appoint counsel. Many indigents would fare badly under such a procedure because an appellate court in making such a screening would often determine the merits at that preliminary point. Thus an indigent would rarely have counsel on appeal in those situations in which representation is most important—where the initial weight of the argument is apparently contrary to his contentions and trained help by a committed advocate is necessary to uncover and pursue less obvious or complicated issues.

The Court, in concluding as it did in *Douglas*, applied reasoning developed in the State transcript cases, especially

Eskridge v. *Washington State Board of Prison Terms and Paroles,* 357 U.S. 214 (1958) and *Draper* v. *Washington,* 372 U.S. 487 (1963). In these cases the Court found a State procedure unconstitutional which authorized a free trial transcript only if the trial judge certified that the appellant's contentions were not frivolous. The evil in those cases was that an indigent could not have his conviction reviewed with the benefit of a record unless the court found his case worthy on its unaided screening or unless he had the means to buy his own. The evil in the *Douglas* case was that an indigent could not have his conviction reviewed with the benefit of a lawyer's analysis and argument unless the same conditions were met.

The infirmities in the California procedure rejected in *Douglas* are not cured by the procedure in *In Re Nash,* 61 Cal.2d 491, 39 Cal.Rptr. 205, 393 P.2d 405 (1964), which was applied in this case (P.R. 11) and which the California Supreme Court determined satisfied the *Douglas* requirements. Under the *Nash* procedure the preliminary screening to determine whether an indigent should have his conviction reviewed with the benefit of counsel's briefs and arguments is shifted from the court to the appointed attorney. If he files a conclusory "no merit letter" (App. B), as in this case, the appellate court neither requires a full statement of reasons by the appointed attorney nor appoints another attorney, but proceeds to evaluate the appeal on the record or, in addition, on the indigent's *pro se* briefs, such as they are.*

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* The California procedure as stated in *In Re Nash,* 61 Cal.2d at 495, 39 Cal.Rptr. at 208, 393 P.2d at 408, is as follows:

> "In Douglas v. California, 372 U.S. 353, the United States Supreme Court held that it was a denial of equal protection

The California procedure creates two striking threats to fair process and substantial equality of treatment. First, once the appointed attorney has filed a "no merit letter" the appellate court proceeds to evaluate the merits of the indigent's appeal without anyone arguing for him and with the State represented by counsel who files a brief urging affirmance. This is an adversary proceeding with only one side represented. In an important respect this procedure is even more unfair than that condemned in *Douglas* v. *California* since under it the court's first examination of the case follows the announced conclusion of defendant's lawyer that the case has no merit. In short, if the trouble in *Douglas* was that the defendant was not represented, the trouble in *Nash* is that he is adversely represented.

Second, the determination of whether or not the indigent will be represented is shifted from a disinterested appellate court to an attorney who often will view the appointment as a nuisance. Many attorneys, of course, will carefully comb the record, engage in thorough research and analysis, and set forth in brief and oral argument every contention which can be made in good faith. Many others, however,

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of the laws to refuse to appoint counsel to represent an indigent defendant on his appeal from a criminal conviction. (See also Vasquez v. District Court of Appeal, 59 Cal.2d 585, 586-587, 30 Cal.Rptr. 467, 381 P.2d 203.) We believe that the requirement of the Douglas case is met, however, when, as in this case, counsel is appointed to represent the defendant on appeal, thoroughly studies the record, consults with the defendant and trial counsel, and conscientiously concludes that there are no meritorious grounds of appeal. If thereafter the appellate court is satisfied from its own review of the record in the light of any points raised by the defendant personally that counsel's assessment of the record is correct, it need not appoint another counsel to represent the defendant on appeal and may properly decide the appeal without oral argument."

will understandably see themselves as "friend of court" and will weigh, on the one hand, the probability of success on appeal against, on the other, the time burden imposed both on the attorney and the court if full argument is presented. This will lead to the filing of a large number of "no merit letters" and the consequent denial of representation on appeal. The experience in the District Court of Appeal in which this case was tried indicates that in a significant portion of cases in which counsel are appointed "no merit letters" are written and briefs are not filed (App. B).

The California procedure under which counsel is denied upon the decision of appointed attorney is analogous to the procedure found invalid in *Lane* v. *Brown*, 372 U.S. 477 (1963). There, under an Indiana procedure, only the public defender could procure a free transcript of a *coram nobis* hearing for an indigent to enable him to appeal denial of the writ. This Court found a denial of equal protection:

> "The upshot is that a person with sufficient funds can appeal as of right to the Supreme Court of Indiana from the denial of a writ of error *coram nobis*, but an indigent can, at the will of the Public Defender, be entirely cut off from any appeal at all." 372 U.S. at 481.

In the instant case, although petitioner's right to appeal was not cut off entirely, his right to an effective appeal, by counsel, a right guaranteed by the Fourteenth Amendment under *Douglas* v. *California*, *supra* was cut off at the will of the appointed attorney.

The California Supreme Court stated that the *Nash* procedure affords indigents "substantially the same representation by counsel on appeal as is afforded indigent

federal prisoners seeking to appeal in forma pauperis." 61 Cal.2d at 496-497; 39 Cal.Rptr. at 208; 393 P.2d at 408.

After the decision in the *Nash* case, however, the United States Court of Appeals for the District of Columbia faced the equality problems raised by the federal appellate procedure, which *Nash* found analogous to California's, and concluded that a procedure under which appointed counsel could withdraw from a case on the basis of his conclusory statement that the case had no merit was defective.

In *Tate* v. *United States,* 359 F.2d 245 (D.C. Cir. 1966), three Circuit Judges found improper the granting of appointed counsel's motion to withdraw by the District of Columbia Court of Appeals on the basis of a two paragraph conclusory report by counsel indicating that the appellant's contentions were unmeritorious. The Circuit Court stressed that the District of Columbia Court of Appeals was not adequately insuring that indigents were being represented by "diligent, conscientious advocate[s] in an adversary process." 359 F.2d at 253.

Soon thereafter, in *Johnson* v. *United States,* 360 F.2d 844 (D.C. Cir. 1966), three other Circuit Judges denied appointed counsel's motion to withdraw. Apparently the Circuit Court had been confronted with numerous requests for withdrawal by appointed counsel, in most instances the requests were granted, new attorneys were not appointed, and indigent appellants were advised that they could go on *pro se.* 360 F.2d at 845 (concurring opinion). The opinion reiterated the Circuit Court policy urging appointed counsel, especially in direct appeals from criminal convictions, to remain in the case, but recognized that counsel might "feel a case to be so lacking in merit that he desires

to withdraw on that ground." 360 F.2d at 844. In such a situation, however, the attorney must file a confidential memorandum, served only upon the appellant, "analyzing the case legally, citing record references to the transcript . . . and also citing any case or cases upon which counsel relied in arriving at his ultimate conclusion." 360 F.2d at 844-845. The court stated:

> "To fulfill our responsibility under the *Ellis* decision, we must conclude not only that counsel has made a conscientious investigation of the case, but also that we agree with his evaluation of it. We cannot reach a conclusion in the absence of a fully documented memorandum." 360 F.2d at 845.

The right to appointed counsel in the state courts, as in the federal courts, is the right to appointment of an advocate, not to an attorney acting as *amicus curiae*. The language in both *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) and *Douglas* v. *California*, 372 U.S. 353 (1963) assumes that counsel acts as an advocate on behalf of his indigent client. Substantial equality and fair process in the adversary context requires this. The rejection of the California screening process in *Douglas* would have been baseless if consideration by *amicus* was sufficient under the Fourteenth Amendment. Certainly an appellate court adequately could fulfill that role.

The California procedure applied in the instant case suffers from the same infirmities as the District of Columbia procedure in effect prior to the *Tate* and *Johnson* cases. A substantial number of appointed attorneys file "no merit letters" (see App. B), there is no assurance that counsel are acting as advocates, and appeals of indigents

often proceed without benefit of lawyer briefs and arguments.

In the federal system an indigent may be denied leave to proceed *in forma pauperis* if his only issues are "frivolous." *Coppedge* v. *United States,* 369 U.S. 438 (1962). No greater obligation should be placed on the States under the Fourteenth Amendment. But it is difficult to imagine many appeals that present only "frivolous" issues in view of counsel's ability, and duty, to argue for appropriate changes in the law. In this case, for instance, the prosecutor and the trial judge commented on petitioner's failure to testify (R. Ex. 2, pp. 108, 119-120). They thus transgressed due process rights later announced in *Griffin* v. *California,* 380 U.S. 609 (1965). Appellate argument for overruling or distinguishing *Adamson* v. *California,* 332 U.S. 46 (1947) would certainly not have presented a "frivolous" contention.

In any event, the issue of frivolity must be determined by a means which amply protects the indigent appellant from being denied representation where non-frivolous issues are involved. The California procedure does not furnish such protection for, as in this case, it leaves the evaluation to an appointed attorney who may act as *amicus* rather than advocate and who will have many reasons for not briefing or arguing a case where in his estimate the chances of success are slim.

The practice of the District of Columbia Circuit Court of Appeal affords more adequate protection. Counsel must convince the court that the issues are truly "frivolous." This must be done in a documented memorandum which analyzes the facts and applicable law. There is little time

advantage in preparing such a memorandum over filing a brief on the merits and hence the temptation to withdraw where the chances are slim is minimized. At the same time, however, the procedure provides a means for appointed counsel to withdraw in a case where he believes that he can make no argument in good faith.

III.

Petitioner's Claim Is Properly Before This Court.

The State of California in its Response to the Petition for Certiorari did not contend that petitioner lacked standing, that the case was moot, or that the State court's decision rested on an adequate non-federal ground. The absence of such contentions seems proper. Nevertheless, petitioner wishes briefly to indicate that his case is properly before this Court despite the fact that success on remand, should petitioner prevail, will not lead automatically to his release from custody.

Petitioner is presently serving a prison term which may last until August 9, 1982. If he is successful in securing reversal of the conviction here in issue he must be released no later than January 20, 1979.

Petitioner was convicted of possessing marijuana on August 9, 1957. He received an indeterminate sentence of six months to ten years (App. A). Under the California indeterminate sentencing law the Adult Authority fixes the sentence within these limits. Calif. Penal Code, §§ 3023, 5077. When on parole petitioner was arrested for burglary. He was convicted for this offense on January 20, 1964 and received an indeterminate sentence of six months to fifteen years to run consecutively with the prior sentence (App. A).

Under California law the two consecutive sentences became one continuous term, 27 *Opinions of the Attorney General* 210 (Calif. 1956), the aggregate maximum of which is twenty-five years commencing on the date of the first conviction.

Under Calif. Penal Code, § 3024(c) the Adult Authority had to require that petitioner serve a minimum of at least two years from the date of the second conviction, or until January 20, 1966. After that time the Adult Authority is authorized to release or parole petitioner. However, under Calif. Penal Code, § 3021, the Adult Authority may determine or redetermine at any time prior to outright release the length of time petitioner must serve (or be subject to parole conditions) within the aggregate maximums of the consecutively imposed sentences. *In Re Cowen,* 27 Cal.2d 637, 166 P.2d 279 (1946), cert. denied, 329 U.S. 742 (1947). *In Re Costello,* 262 F.2d 214 (9th Cir. 1958); 27 *Opinions of the Attorney General* 210 (Calif. 1956).

Petitioner sought certiorari on both convictions—from denial of collateral relief regarding the first (in the instant proceeding) and from affirmance on direct appeal of the second (the petition still pending this Court's action). If he were successful on both, and reversals followed in the California courts, he would be released from custody immediately. Certiorari, however, has only been granted regarding the first conviction. Success in this proceeding alone will not lead to immediate release. But it may lead to a reduction of the maximum possible term of incarceration and to erasing from the record before the Adult Authority a prior conviction of relevance in the setting of the term within the fifteen year maximum under the second conviction.

Habeas corpus is an appropriate remedy in California to test the legality of a conviction where fundamental unfairness, such as lack of counsel, is charged even though success on the petition will not lead to immediate release. *In Re Jackson,* 61 Cal.2d 500, 503, 39 Cal.Rptr. 220, 393 P.2d 420 (1964); *In Re Newbern,* 53 Cal.2d 786, 3 Cal. Rptr. 364, 350 P.2d 116 (1960); *Neal* v. *State of California,* 55 Cal.2d 11, 9 Cal.Rptr. 607, 388 P.2d 182 (1960); *In Re James,* 38 Cal.2d 302, 240 P.2d 596 (1952). See Witkin, California Criminal Procedure, §§ 808, 828 (1963).

The District Court of Appeal denied petitioner's application for habeas corpus to reinstate his appeal on the merits (P.R. 11). That petition was based on the federal claim that California had denied petitioner a right to counsel on appeal secured by the Fourteenth Amendment (R. Ex. 12). No appeal lies from the denial of habeas corpus in California. *People* v. *Ryan,* 118 Cal.App.2d 144, 257 P.2d 474 (1953). An applicant can proceed only by petition for habeas corpus in the higher court. *Ibid.* This petitioner did, again raising his federal constitutional claim (P.R. 14-23). The California Supreme Court's order does not state the reasons for denial. But in view of the intermediate court's ruling on the merits and the scope of the habeas remedy under California law, it cannot be argued that the order of the California Supreme Court rested on some unstated adequate non-federal ground.

Arguably, the doctrine of *McNally* v. *Hill,* 293 U.S. 131 (1934) prevents a federal court from granting relief under 28 U.S.C. § 2254 if the applicant would not thereby be entitled to immediate release from custody. But see *United States ex rel. Durocher* v. *La Vallee,* 330 F.2d 303 (2d Cir.), *cert. denied,* 377 U.S. 998 (1964); Heyman and Tigar,

Book Review: *A Handbook on Federal Habeas Corpus*, 53 CALIF. L. REV. 914, 918 (1965). Nevertheless, the *McNally* doctrine is not applicable where this Court reviews a state court denial on the merits of a petition for collateral relief based on a federal claim. The question is not the extent of relief available under 28 U.S.C. § 2254, but whether there has been a final judgment of the highest state court in a case and controversy rejecting a federal claim. A case and controversy exist here. Petitioner is prejudiced by the conviction in two substantial ways. There has been a final judgment by the California Supreme Court rejecting petitioner's federal claim.

Conclusion

The refusal to provide counsel to brief and argue petitioner's first appeal as of right on the basis of the conclusory statements of the appointed attorney that the case had no merit denied petitioner rights secured by the Fourteenth Amendment. The case is properly before this Court.

The judgment of the California Supreme Court should be reversed and the case remanded with directions to reinstate petitioner's appeal.

Respectfully submitted,

IRA MICHAEL HEYMAN
Counsel for Petitioner

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APPENDIX A

(Letterhead of Department of Corrections, Sacramento)

July 29, 1966

Mr. Ira Michael Heyman
University of California
School of Law (Boalt Hall)
Berkeley, California 94720

Re: ANDERS, Charlie
CSP No. A-42880

Dear Mr. Heyman:

In response to your letter of July 19, 1966, the above-identified inmate is under sentence on two commitments as follows: He was received August 12, 1957 from Merced County, Case No. 4638 for Possession of Narcotics, in violation of Section 11500 of the Health and Safety Code for an indeterminate sentence of 6 months to 10 years. On January 22, 1964 he was returned from parole as a violator with a new term from San Bernardino County, Case No. CR 16312, for the offense of Burglary 2nd degree with two prior felony convictions for an indeterminate sentence of 6 months to 15 years, to run consecutively with the Merced County term.

Pursuant to Section 3024(b) of the Penal Code, his minimum term is aggravated to 2 years on the second sentence and pursuant to Section 3043 of the Penal Code, he is required to serve 2 years prerequisite to parole. This establishes a minimum eligible parole date of January 22, 1966. Since he has served his minimum, the prior felony conviction will not limit any future Adult Authority action in this case.

Since the two commitments are consecutive with each other, he is serving one continuous term (Ops. Atty. Gen., Vol. 27, Page 210).

We hope this is the information desired.

Very truly yours,

WALTER DUNBAR
Director of Corrections

/s/ PETER J. MURRY
Peter J. Murry
Chief Records Officer

PJM/jr

cc: Mr. Glen Smith, R.O.
CSP, Folsom

APPENDIX B

The following excerpt is quoted from Volume 2, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS —THE STATE REPORTS (Silverstein, Ed. American Bar Foundation 1965), pp. 67-68. The passage appears in the report on California prepared by Professor Norman Abrams of Los Angeles and Bernard Petrie, Esq. of San Francisco.

"The following statement described the current practice regarding appointment of counsel on appeal in the Third District Court of Appeal, which receives cases from both Shasta and Sacramento Counties:

> Before *Douglas* v. *California* the court declined to appoint counsel for indigents only in cases of guilty pleas. Thus, this district did not pursue the practice of screening the record and sometimes declining appointment, as did the Second District. Now, after the *Douglas* case, the Third District appoints counsel in cases of guilty pleas as well. A full transcript is provided free of charge. In a significant portion of the cases in which counsel are appointed, such counsel write a so-called no-merit letter and do not bother to write a brief, enabling a swifter disposition. Even in such cases a research attorney and the judge assigned to write the opinion go over the case and examine the transcript. Counsel are appointed from a panel of young attorneys who volunteer. Sometimes, through inexperience, these attorneys overlook points, but they are backed up by the court's research attorney. Compensation varies from $50 to $300.

As a result of the decision in *Douglas*, the Riverside County Public Defender's Office has recently undertaken, at the request of the Fourth District Court of

Appeal, to handle all indigent appeals arising from Riverside. No final arrangements for compensation have been made yet, but the hope of the public defender is that the district court of appeal will be able to make payments for his services by transferring money to the county out of the fund from which it ordinarily pays private appointed attorneys. In several such appeals the defender has filed a statement in lieu of brief, in which he indicates that he has reviewed the transcript and has found no grounds for appeal. Apparently court-appointed counsel in appeals arising from Los Angeles are being required to file a similar statement setting forth the facts of the case, the issues potentially involved on appeal, and the conclusion, if appropriate, that the appeal is without merit. The Los Angeles County Public Defender, even prior to *Douglas,* took an appeal in a limited number of cases handled by its office at the trial level, but there is no indication that *Douglas* has affected the number of appeals handled by this office."

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